

Special Citizens Futures Unlimited, Inc. and District Council 1707, AFSCME, CSEA, Petitioner.
Case 2-RC-21895

May 18, 2000

DECISION AND DIRECTION OF SECOND
ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held at the Employer's three group homes on October 17 and 18, 1997,¹ and the Regional Director's Report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 9 ballots for and 16 against the Union, with 4 challenged ballots, an insufficient number to affect the results.²

The Board has reviewed the record in light of the exceptions and briefs and adopts the Regional Director's findings and recommendations only to the extent consistent with this Decision, and finds that the election must be set aside and a new election held.

On September 19 and 23, respectively, the Union and the Employer executed a Stipulated Election Agreement. Pursuant to item 2 of that election agreement, the Employer agreed to submit an *Excelsior*³ list to the Regional Office within 7 days of the agreement's approval. Contrary to established Board procedure, the Regional Office failed to notify the parties immediately upon the election agreement's approval on September 26.⁴ Specifically, the Regional Director's preelection letter to the parties, although dated September 26, was not mailed out until October 2, along with the election notices. The letter, in addition to notifying the parties of the election agreement's approval, also directed the Employer to file an *Excelsior* list "containing the full names and addresses of all eligible voters" with the Regional Office on or before Friday, October 3, in order to be timely filed. The letter also warned that the Employer's failure to comply "shall be grounds for setting aside the election whenever proper objections are filed."

On October 3, the Petitioner's counsel telephoned the Employer's counsel to ascertain when the *Excelsior* list would be submitted to the Regional Office. In response, the Employer's counsel contacted the Regional Office and was informed that the *Excelsior* list was due that day. At approximately 6:24 p.m. that evening, after the Regional Office had closed,⁵ the Employer's counsel

transmitted an *Excelsior* list to the Regional Office by facsimile. The 3-page list, comprised of 27 names and addresses, included only the employees' surnames and first initials, rather than their full names as required.

On the afternoon of Monday, October 6, the Regional Office transmitted a copy of that list to the Petitioner's counsel by facsimile; however, counsel received only two of the three pages. There was no indication that the list was a provisional one. Upon receipt of the list, the Petitioner's counsel faxed it to the Petitioner's director of organizing. Later that day, however, the Employer's counsel submitted a second, revised *Excelsior* list to the Regional Office. This list omitted one name from the original list and included four additional names. Unlike the original *Excelsior* list, this list included both the employees' first and last names.

Again contrary to established Board procedure, the Regional Office did not immediately forward the second *Excelsior* list to the Petitioner's counsel.⁶ Rather, the Regional Office waited until the afternoon of the following day, October 7, when it then transmitted a copy of that list by facsimile. The Petitioner's counsel was not advised that the list was meant to supersede the list it had received the day before. Unaware of the disparity between the two lists, the Petitioner's counsel did not forward the second list to the Petitioner's organizing staff. On October 15, at the Regional Office's request, the Employer submitted yet a third *Excelsior* list, with employees' names organized by polling site. The election was conducted on October 17 and 18.

In his report, the Regional Director, relying on *Pole-Lite Industries*, 229 NLRB 196, 197 (1977),⁷ concluded that the Employer here had substantially complied with the *Excelsior* rule, although it had failed to submit the *Excelsior* list in a timely manner. He based his conclusion upon the factors then considered relevant by the Board, including, inter alia, (1) the number of days which the list was overdue; (2) the number of days which the union had the list prior to the election; and (3) the number of employees eligible to vote in the election. The Regional Director reasoned that the Employer had submitted the first *Excelsior* list after the close of business on the 7th day after the approval of the election agree-

¹ All dates are in 1997 unless otherwise indicated.

² The tally of ballots inadvertently stated that there were approximately "40" employees eligible to vote in the election; the correct number is 30.

³ See *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

⁴ See Sec. 11312.1(a) of the NLRB Casehandling Manual (Part Two), Representation Proceedings.

⁵ The Regional Office's official closing time is 5:15 p.m.

⁶ See Sec. 11312.2 of the NLRB Casehandling Manual (Part Two), Representation Proceedings, which provides that the *Excelsior* list should be mailed to all parties "[i]mmediately upon receipt." See also *Mod Interiors*, 324 NLRB 164, 165 (1997) (explaining that the petitioner is "entitled to receive the list as soon as it is filed"); Sec. 102.113(d) of the Board's Rules and Regulations which provides, in pertinent part, that the Board may serve certain documents, including *Excelsior* lists, by facsimile transmission.

⁷ In *Pole-Lite*, the Board found that the employer had substantially complied with the *Excelsior* rule where it sent the list by hand delivery on the date that it was due; the delay of receipt of the list by the Regional Office by 3 calendar days and 1 business day was due to holiday traffic; and the union had the list for 14 days prior to the election, and thus had sufficient time to communicate with the relatively small unit of 29 employees.

ment, and that the revised list, which cured any deficiencies in the first list, was submitted only 3 calendar days and 1 business day later. In addition, he also reasoned that the 10 days during which the Petitioner had the *Excelsior* list in its possession prior to the election was ample time for it to communicate with the relatively small unit of 30 employees.

Considering the size of the unit, that the Petitioner had the *Excelsior* list for 10 days, and that the Petitioner had failed to establish that its election campaign had been materially prejudiced by the late receipt of the *Excelsior* list, the Regional Director concluded that any prejudice the Petitioner may have suffered due to the Regional Office's error was "de minimis," and did not warrant setting aside the election. Accordingly, the Regional Director recommended that the Petitioner's *Excelsior* objections be overruled and that a certification of results be issued. We disagree.

It is well established that the purpose behind the *Excelsior* rule "is not intended to test employer good faith or 'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." *Mod Interiors*, supra, 324 NLRB at 164, citing *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994). The *Excelsior* rule helps achieve this goal of "an informed employee electorate" by giving unions the right of access to employees that employers already have, thus enabling employees to hear not just the employer's views, but also the union's arguments in support of unionization. *Thiele Industries*, 325 NLRB 1122 (1998). Contrary to the Regional Director, we find that the delay here in the Petitioner's receipt of a complete and accurate *Excelsior* list interfered with this purpose.

The Board had in mind the reasons behind the *Excelsior* Underwear employee list requirement, described above, in *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998), which issued after the Regional Director's report in the instant case. In *Alcohol & Drug Dependency Services*, the Board concluded that the election should be set aside because, "contrary to the *Excelsior* requirements, the Employer did not provide the list to the Region within 7 days of the Regional Director's approval of the election agreement. Further, contrary to established Board procedure, the Region, upon receipt of the list, did not immediately mail it to the Union." *Id.* In reaching this conclusion, the Board held that in cases involving a delayed receipt of an *Excelsior* list, "the relevant inquiry is whether the delay—however caused—interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights." *Id.*

Specifically, in *Alcohol & Drug Dependency Services*, the election was set aside when the delay attributed to the Regional Office caused the list to be submitted 4 days later than it should have been, so that the union had access to the list for only 5 days before the election. The Board, agreeing with the Regional Director, found that this delay diminished the time during which the union could communicate with unit employees. *Id.* at fn. 8. The Board stated, however, that further "tangible" evidence of prejudice, such as evidence of specific actions that the union had planned but was unable to undertake due to the late receipt of a list, was not required to establish that the delay resulting from the Regional Office's error had prejudiced it. *Id.* In deciding to set aside the election, the Board also considered that the employees were dispersed over five locations, that the unit was relatively large, consisting of, at minimum, the 100 employees who voted, and that the vote, at 48 for and 50 against, with 1 challenged ballot, was extremely close. *Id.* As noted above, the fact that the delay was attributable to the Regional Office rather than the Employer was not determinative. *Id.*

In the instant case, it is undisputed that the first list provided by the Employer, which set forth only the employees' last names and first initials, but not their full first names, was not in keeping with the *Excelsior* rule. See *Laidlaw Waste Systems*, 321 NLRB 760 (1996), citing *North Macon*, supra, 315 NLRB at 361. Further, the Petitioner's counsel received only two of the three pages of the first *Excelsior* list. Although the Employer submitted a revised *Excelsior* list the next business day, thereby curing the deficiencies in the first list, neither the Employer nor the Regional Office advised the Petitioner's counsel that the second list, which he received 4 days late, was not a duplicate of the first list, but rather a revised list meant to supersede it. Unaware of the disparity between the two lists, the Petitioner's counsel never forwarded the complete and revised list, which omitted one name and added four new names to the original list, to the Petitioner's organizing staff for use in its election campaign. We further note that the unit employees worked at three different facilities. Under these circumstances, the Petitioner here was at an obvious disadvantage in communicating with the unit employees. See *Alcohol & Drug Dependency Services*, supra; *Women in Crisis Counseling & Assistance*, 312 NLRB 589 (1993).

Finally, we disagree with the Regional Director's reliance on the Petitioner's possession of the list for 10 days prior to the election and its failure to show that it had been prejudiced by the Regional Office's delay in forwarding the lists. As explained in *Mod Interiors*, supra, 324 NLRB at 164, the Board's practice is to give a petitioner an opportunity to make use of an *Excelsior* list for at least 10 days before the election. See Section 11302.1 of NLRB Casehandling Manual (Part Two), Representation Proceedings. Inasmuch as an employer must file the

Excelsior list with the Regional Office within 7 days after the approval of the election agreement, and a petitioner is entitled to that list as soon as it is filed, a petitioner could, as in the instant case, be entitled to that list for more than 10 days, depending on when the election is scheduled. *Mod Interiors*, supra at 164.

Our dissenting colleague, for the reasons set forth in his dissent in *Alcohol & Drug Dependency Services*, supra, would not set aside the instant election. He finds, in agreement with the Regional Director, that the Employer acted in good faith and in substantial compliance with the *Excelsior* requirements. We do not disagree; however, as noted above, that is not the relevant inquiry here. Rather, for purposes of determining whether to set aside an election in cases of delay, the Board has made clear that it will look only at whether that delay “interfered with the purpose behind the *Excelsior* requirements.” *Id.* Accordingly, in directing a second election here, we rely solely on the fact that the Petitioner was prevented from making full use of the *Excelsior* list because of its delayed receipt. Contrary to our dissenting colleague’s view, we reiterate that a showing of actual injury by virtue of the shorter time is unnecessary for purposes of setting aside an election. See *id.* at fn. 8 and the cases cited therein. We do, however, note that the record establishes that the Petitioner was impeded in its ability to communicate with the unit employees.

Under all of these circumstances, we conclude that the purposes behind the *Excelsior* requirement of providing employees with a full opportunity to be informed of the arguments concerning representation have been frustrated. Accordingly, we find that the election must be set aside and a new election directed.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

I agree with the Regional Director that the Employer was in substantial compliance with the *Excelsior* requirements and that the election should not be set aside.

The case involves deficiencies on the part of the NLRB Regional Office and the Union, i.e., everyone except the Employer. Further, notwithstanding these deficiencies, the Union had the *Excelsior* list for 10 days prior to the election. Despite all of this, my colleagues overturn the election, which the Union lost.

In brief, the facts are as follows. The stipulation was approved on September 26. However, contrary to established Board procedures, the Region waited until October 2 to send out the poststipulation letter apprising the Employer of the *Excelsior* requirements. On October 3, before the Employer’s receipt of the Region’s letter, the Union inquired of the Employer as to when the *Excelsior* list would be sent to the Region.¹ In response, the Em-

ployer faxed the list to the Region on that day. However, since the Employer had not yet received the Region’s letter of October 2, the *Excelsior* list did not contain the full names of employees. The list contained only surnames and first initials. There were 27 names.²

On October 6 (Monday), the Region sent that list to the Union’s counsel. However, because of a transmission error, the list contained only two of the three pages. The Union’s counsel forwarded it, as it was, to the Union’s organizer.

Also, on October 6, the Employer sent a revised *Excelsior* list to the Region. The list contained full names. It also corrected inadvertent errors, by deleting one name and adding four others.³

Contrary to NLRB policy, the Region waited until October 7 to send that list to the Union’s counsel. The Union’s counsel did not send it to the union organizer. According to my colleagues, he assumed that it was a duplicate of the prior list. If he had simply perused it, he would have known that this was not so.

On October 15, pursuant to a Regional request, the Employer sent another *Excelsior* list, with employees arranged by polling site.

Based on the above, it is clear that the Employer acted promptly, correctly and in good faith.⁴ The Union and the Region did not act promptly and correctly. Notwithstanding this, the Union’s agent (the attorney) had a valid *Excelsior* list for 10 days prior to the election. In these circumstances, it is unfair and unwarranted to overturn the election, which the Union lost.⁵

My colleagues do not challenge the fact that “the Employer acted in good faith and in substantial compliance with the *Excelsior* requirements.” In my view, this is sufficient to defeat an objection based on *Excelsior*.⁶ Nonetheless, on the basis of *Excelsior*, my colleagues set aside the election. In this regard, they rely solely on the

² The Employer explained to the Region that, because of religious holidays, it could not then confirm complete accuracy. The Region gave the Employer the right to modify the list.

³ See fn. 2 supra.

⁴ As noted above, the Employer’s failure to send the *Excelsior* list to the Region within 7 days of the stipulation was the fault of the Region.

⁵ See my dissent in *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998). The cases cited by the majority are inapposite. Thus, in *Mod Interiors*, 324 NLRB 164 (1997), 40 percent of the names on the list originally furnished by the employer were inaccurate and the revised list was not filed until 8 days before the election. In *Thiele Industries*, 325 NLRB 1122 (1998), the Board did not set aside the election. The employer was foreclosed from filing an objection based on its own alleged misconduct. The Board also found that there was no employer “misconduct” where there was “no evidence that the Employer deliberately omitted the name of any employee that it believed to be eligible” Finally, in *Laidlaw Waste Systems*, 321 NLRB 760 (1996), unlike here, the only list that the employer furnished omitted the full names of employees, and this error was attributable to the employer.

⁶ See, e.g., *Lobster House*, 186 NLRB 148 (1970); *Fontainebleau Hotel Corp.*, 181 NLRB 1134 (1970); *Gamble Robinson Co.*, 180 NLRB 532 (1970); *Program Aids Co.*, 163 NLRB 145 (1967); *Valley Die Cast Corp.*, 160 NLRB 1881 (1966).

¹ The letter was sent by regular mail. The Employer asserts that it did not receive the letter by October 3. There is no claim to the contrary.

asserted fact that “the Petitioner was prevented from making full use of the *Excelsior* list because of its delayed receipt.” As discussed above, I believe that “good faith” and “substantial compliance” with *Excelsior* are sufficient to defeat an *Excelsior* objection, at least in the circumstances of the instant case. However, even accept-

ing as critical the matter on which my colleagues solely rely, they are incorrect even as to that factor. As noted above, the Petitioner’s agent had a valid list for 10 days prior to the election. He simply neglected to send it to his principal.